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NO. 83-1854

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1983

CHERYL ANNE RENFROE,
Petitioner

vs.

DR. JOHN R. KIRKPATRICK, Superintendent, Piedmont City Schools; SHERMAN D. MEERS, Principal, Southside Elementary School; and PIEDMONT CITY BOARD OF EDUCATION,
Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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CITATION OF AUTHORITIES

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QUESTIONS PRESENTED

1. Did the 11th Circuit Court of Appeals err in affirming the decision of the District Court based upon the guidelines set out in *Connick vs. Myers,* 103 S.Ct. 1684; 75 L.Ed. 2d 708 (1983)?

2. Whether or not the 11th Circuit Court of Appeals erred in holding that the written grievances filed by the petitioner with the Board of Education were matters of personal interest only?

3. Whether or not the 11th Circuit Court of Appeals erred in holding that petitioner's oral presentation before the Board in reference to the students' welfare was not sufficient to bring her grievance within the rubric of matters of "public concern"?

STATEMENT OF THE FACTS

This is a case involving the dismissal of a non-tenured teacher employed by the Piedmont City Board of Education. Under the Alabama Law, petitioner had not gained tenure status. She was subject to dismissal without a hearing.

In the early part of the year 1981, information had been received by the Piedmont City Board of Education that there would be a substantial cut in the anticipated revenue for the school year, 1981-82. In the meeting of the Board in February, 1981, Dr. John R. Kirkpatrick, Superintendent of Education, was requested to make recommendations to the Board in its March, 1981, meeting as to possible cuts that could be made for the coming school year.

At the March 18, 1981, Board meeting, the Superintendent made certain recommendations as to possible cuts in the budget, one of which was to cut one of three non-tenured teachers at the Southside School. Another recommendation was to notify all non-tenured teachers, which included the petitioner, that they would not be invited back for the schoolyear 1981-82. This written notice to each teacher was sent out on March 23, 1981.

A staff meeting was called by Dr. Kirkpatrick on the following day, March 19, 1981, at which time the principals of the various schools were requested to make recommendations as to which teachers they would invite back. The general practice was for the principal to make the recom-

mendation to the Superintendent who in turn made the written recommendation to the Board. At this staff meeting, the decision was made to invite Sherri Jones, a non-tenured teacher, back for the next school term, and not to invite the petitioner back. Since one kindergarten job was to be eliminated, a decision had to be made as to which teacher would be recommended. The recommendation was made by Principal Sherman Meers to invite Sherri Jones back instead of petitioner. There were two teachers to fill one job.

Much of petitioner's case involved the issue of whether or not she was a better teacher than Mrs. Jones. The respondents freely admitted that both teachers were excellent teachers, but this testimony had nothing to do with the issue of First Amendment violations. The testimony shows that Sherri Jones did miss 18 days during the year because of surgery.

After the decision not to invite petitioner back was made, Superintendent Kirkpatrick conceived the idea that he might be able to keep both teachers by getting both teachers to agree to a job sharing arrangement. This arrangement had been used successfully by the system almost every year since Dr. Kirkpatrick's appointment as Superintendent.

Ms. Jones readily consented to a job share arrangement when interviewed on April 10, 1981. Petitioner was not in school on that day which was on a Friday and Dr. Kirkpatrick would have to wait until Monday, April 13, 1981, to see if she would consent. Dr. Kirkpatrick testified that the job share arrangement would not work unless both teachers agreed.

Before Dr. Kirkpatrick returned on April 13, 1981, to interview petitioner, he had his secretary type up and mail

to the Board his recommendations for teacher assignments for the next year at Southside and the other two schools in the system. This is undisputed. The teacher recommendations had already been typed and mailed prior to his meeting with petitioner. The recommendation did not include the name of the petitioner.

When Dr. Kirkpatrick went to the Southside School on April 13, 1981, to meet with petitioner, he had a very cool reception and she in no uncertain terms and in a belligerent manner refused to job share.

The decision had already been made at this point not to invite petitioner back for the next school term and this decision stood.

Ms. Renfroe then filed at least two written grievances with the Board. The substance of these written grievances were to the "effect that she had been told that I will have to job share a Kindergarten position, receiving half a salary, with a person who has one year less teaching experience than I do. I feel that as I have seniority, I should not have to share this Kindergarten position".

At no time during the trial of the case or in her brief to the 11th Circuit, did the petitioner raise the issue that her protected First Amendment rights concerned an issue of public concern. This issue was raised for the first time when the 11th Circuit Court of Appeals requested the attorneys to file a letter brief solely addressing the effect on this appeal of the Supreme Court's decision of April 30, 1983, in *Connick vs. Myers,* 103 S.Ct. 1684, 75 L.Ed. 2d 708 (1983).

The evidence is uncontroverted that the decision not to invite petitioner back had been made on March 19, 1981. When petitioner emphatically refused to job share on April 13, 1981, the issue was settled. Although the Board was not required to let her appear before the Board, it let her ad-

dress them on April 14, 1981. The evidence is very clear from her statements before the Board, and her prior statements, were to the effect her only concern was keeping her job. Any alleged First Amendment violations occurred after the decision not to invite her back had already been made.

REASONS FOR DENYING THE WRIT

The petition should be denied because (1) the Eleventh Circuit's opinion is consistent with the authoritative decisions of this Court (2) there is no split among the Circuits and (3) the Eleventh Circuit Court of Appeals correctly applied the facts in the instant case with the guidelines set out in *Connick vs. Myers,* 103 S.Ct. 1684, 75 L.Ed. 2d 708 (1983).

The Eleventh Circuit's decision is altogether consistent with *Connick vs. Myers,* 103 S.Ct. 1684, 75 L.Ed. 2d 708 (1983), and it is apparent that the Court applied the balancing test as set out in *Pickering vs. Board of Education,* 391 U.S. 563 (1968). This is evident when the Court stated in its opinion as follows:

> "In this case, Renfroe's "speech" is conceded to have been personal in nature with the single exception of a claim that her objection to job sharing was motivated in part by concern for the welfare of the students. This concern was raised neither in her initial discussion with the Superintendent nor in her written grievance. It was not until the oral presentation of her grievance to the Board that plaintiff mentioned the welfare of the students as a consideration."

If the decision in this case was ever in doubt, *Connick vs. Myers, ante,* conclusively settled the issue. The U.S. Supreme Court held in this case that when a public employee speaks not as a citizen upon matters of public concern, but

instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to an employee's behavior. The evidence in this case is without dispute that the concern of petitioner was to save her job. The Court in *Connick* said the only interest Myers had was to keep from being transferred.

Assuming for the sake of argument that the confrontation between petitioner and Dr. Kirkpatrick was the reason he made the decision not to invite her back. He had a right under *Connick* to base his decision upon the belligerent attitude of the petitioner. Nothing in this confrontation concerned speech upon a matter of public concern. Dr. Kirkpatrick testified that he had not been talked to in this manner during his fifteen years as superintendent.

The Eleventh Circuit Court of Appeals concluded its decision in this case by saying that under such circumstances, plaintiff's reference to the students' welfare during the oral presentation to the Board is not sufficient to bring her grievance within the rubric of matters of "public concern". The Supreme Court has recognized that the question of whether an employee's speech addresses a matter of public concern must be answered in light of the "content, form, and context of a given statement, as revealed by the whole record".

The Court did not address the contention of the defendants that the grievance was not a substantial or motivating factor in the decision not to rehire Renfroe, as the District Court so decided. The defendants contend that the speech which petitioner contends is protected was made long after the decision not to invite petitioner back was made. How could the so-called protected speech be a motivating factor

in the decision of the Board not to offer her employment the following school year? *Mt. Healthy City School District vs. Doyle,* 429 U.S. 2746, 50 L.Ed. 2d 471.

Petitioner has cited several cases in her petition that were decided by the various Circuits after *Connick, ante.* However, these cases can be easily distinguished from the instant case on the question of "public concern" vs. private concern.

For instance in the cited case of *McGee v. South Pemiscot School District,* 712 F.2d 339 (8th Circuit) (1983) in footnote "4" the Court said that this case (*McGee*) stands on entirely different footing from *Connick vs. Myers,* 103 S.Ct. 1684, 75 L.Ed. 708 (1983). In that case (*Connick*) the plaintiff was discharged for circulating a questionnaire in her office inquiring about the effect of personnel policies on employee morale and the overall performance of the office. The Supreme Court reversed the lower court's holding in favor of the plaintiff. It did so because plaintiff's speech "touched upon matters of public concern in only a most limited sense", and this limited First Amendment interest did not require that the employer "tolerate action which he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships."

The Eleventh Circuit Court of Appeals in the case of *Boyd vs. Secretary of the Navy,* 709 F.2d 684 (1983) followed *Connick* when it said that the memorandum in this case did not implicate Boyd's First Amendment rights. Like the questionnaire in *Myers,* Boyd's memo "touched upon matters of public concern only in a most limited sense.

In *Czurlanis vs. Albanese, et al.,* 721 F.2d 98, (8th) (1983) the "public concern" was an address made by Czurlanis at a public meeting concerning inefficiency, false

reports, duplications, and unnecessary work on and parts for vehicles. This was clearly a matter of public concern.

In *Egger vs. Phillips,* 710 F.2d 292, (7th Circuit) (1983), the Court followed *Connick* in holding that the alleged protected speech was a matter of private concern.

In *Hughes vs. Whitmer,* 714 F.2d 1407, (8th Circuit) the Eighth Circuit reversed the District Court because the lower court had held that the speech was of public concern. The Court in applying *Connick* guidelines said it was of private concern effecting the internal operation of the department.

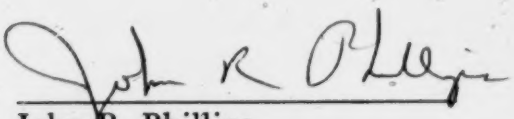
The Ninth Circuit in the case of *McKinley vs. City of Elroy,* 705 F.2d 1110, (1983) the Court clearly distinguished the facts in the *Connick* case from the fact situation in this case. There was no doubt that the issue was of public concern, and some of the respondents admitted that plaintiff was fired because of an appearance on television.

In *Patterson vs. Johnson,* (8th Circuit) (1983) the factual situation was such that there was no dispute that the matters upon which the plaintiff spoke were of a public concern and of a political nature.

CONCLUSION

Respondents submit that the writ is not due to be granted. The petitioner is asking the Court to reverse *Connick*.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I do hereby certify that I have on the 29th day of May, 1984, served a copy of the foregoing Brief on counsel for all parties to this proceeding by mailing same, postage prepaid, to:

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